

Order under Sections 30, 13, 69 and 135
Residential Tenancies Act, 2006

File Numbers: TSL-19173
TST-02088

C. D. S. (the 'female Landlord') applied for an order to terminate the tenancy and evict T. L. (the 'Tenant') because the female Landlord requires possession of the rental unit for the purpose of residential occupation. The Tenant applied for an order determining that the female Landlord and D. D. S. (the 'male Landlord') have collected or retained money illegally. The Tenant also applied for an order determining that the Landlords harassed, obstructed, coerced, threatened or interfered with her, entered the rental unit illegally, substantially interfered with the reasonable enjoyment of the rental unit or residential complex by the Tenant and withheld or deliberately interfered with the reasonable supply of a vital service, care service, or food that the Landlords are obligated to supply under the tenancy agreement. Finally, the Tenant applied for an order determining that the Landlords failed to meet the Landlords' maintenance obligations under the *Residential Tenancies Act, 2006* (the 'Act') or failed to comply with health, safety, housing or maintenance standards.

The female Landlord's application was heard in Toronto on December 18, 2008 and on January 9, 2009. The Tenant's applications were joined to the female Landlord's application and heard on January 9, 2009.

The female Landlord and the Tenant attended both hearing dates. The male Landlord attended only on the second hearing date. The Landlords both testified and represented themselves. On the second hearing date the Tenant testified, was represented by D. R., and called as a witness B. L. (the 'Tenant's Witness').

Determinations:

1. The female Landlord and the Tenant signed a rental agreement for the rental unit on April 17, 2007. The rental unit is a basement apartment in the home of the Landlords. The tenancy commenced on April 13, 2007 and initially was for a fixed term of one year. Under the tenancy agreement the rent is to be paid in cash in the amount of \$550.00 due on the thirteenth of every month. The female Landlord and the Tenant also agreed that the Landlords would have the right to enter the rental unit on Wednesdays in order to do their laundry as the shared laundry facilities were only accessible through the Tenant's rental unit.

The Landlord's Application for Own Use (TSL-19173)

2. The female Landlord served the Tenant a notice to terminate the tenancy effective January 12, 2009 for landlord's own use. At the hearing before me on December 18, 2008 she testified that she and the male Landlord were having marital difficulties and were "separated" but still living in the same house. According to her none of their family members were aware of this separation, no lawyers had been consulted, and no formal

separation agreement had been entered into. She further stated that she and the male Landlord were trying to resolve their problems but that she needed her own space. She testified that it would be better if she were to live in the basement apartment so she could continue to look after the children until she figured out where to go and what to do. At the hearing on January 9, 2009 she stated she would have to stay in the basement apartment because she could not afford to move out and take the children with her.

3. The male Landlord testified that he and the female Landlord having been talking about separating for about six months. The female Landlord is currently sleeping with the children in their beds and it is annoying for them. According to him the female Landlord is the one planning to move out because she cannot afford the mortgage whereas he can.
4. The Tenant testified that she believes the notice to terminate was served on her because of a series of incidents and conflicts she had with the female Landlord which are discussed more fully below. On August 18, 2008 the female Landlord wrote her a letter about some of their conflicts which said: "BE ADVISED, THAT IF WE CAN'T COHABIT TOGETHER & THESE ISSUES DON'T GET RESOLVED I WILL FILE & KEEP ON FILING APPLICATIONS AGAINST YOU & I WON'T STOP TILL YOU GET EVICTED." Shortly after that section the letter says: "Contrary to what you might think, I do want us to get along & to have a semi-decent relationship, but I will leave it up to you." In response to my questions as to what she meant when she wrote this letter, the female Landlord stated she really did not think clearly when she wrote it and what she really meant was that she wanted the conflicts to stop and for the relationship with the Tenant to return to what it had been like before the conflict started.
5. Section 48 of the Act states that a landlord may serve notice to terminate a tenancy if the landlord in good faith requires possession of the rental unit for the purpose of residential occupation by him or herself. The first and central issue in any application involving landlord's own use is whether or not the landlord genuinely intends to live in the rental unit. During both occasions when the female Landlord testified before me that she wanted to live in the rental unit because of her marital difficulties she was weepy and visibly and appropriately upset. I found her evidence concerning her marital difficulties to be consistent and sincere and as a result, I am satisfied that in her own mind she genuinely intends to move into the Tenant's rental unit should she regain possession. I say this despite the letter of August 18, 2008 as the rest of the content of that letter is consistent with the female Landlord's evidence that she was frustrated and upset with the Tenant and would have been happy at the time the letter was written for the tenancy to continue as long as the conflicts and disagreements stopped.
6. However, in this application the Tenant's representative raised a second issue which is that the use intended by the female Landlord does not constitute "residential occupation" as contemplated by section 48 because her intention is to live there temporarily while in transition until she decides what is going to happen with respect to the breakdown of her marriage and care and custody of her children.
7. The Tenant's representative provided me with some case law concerning the interpretation of subsection 48(1) of the Act and the similar provisions which existed in landlord and tenant legislation prior to the current Act coming into force. In *Wiazek v.*

Armstrong, [1994] O.J. No. 2737, the General Division of the Ontario Court of Justice determined that the landlord's true intent in that case was to live part-time in the rental unit and that there was evidence to support the proposition that the claim for own use was a "back up" application in case his first application for termination for arrears of rent did not succeed. I do not find *Wiazek* to be very useful as it is a decision of the General Division and therefore not binding on me, is distinguishable on the facts from this case, and was decided on the basis that the landlord had led insufficient evidence to establish he genuinely required possession of the rental unit for his own use and that of his daughter. Similarly, TSL-04598 as a decision of the Ontario Rental Housing Tribunal is not binding on me and involved a case where the landlord's evidence was insufficient to establish she genuinely required possession of the rental unit for her daughter.

8. However, the Divisional Court's decision in *MacDonald v. Richard*, 2008 CarswellOnt 638 which the Tenant provided is clearly binding on the Board and more relevant. It states that temporary full-time occupancy (which in that case was to be for four months) does not constitute residential occupation as contemplated in subsection 48(1) of the Act.
9. On any application before the Board, the burden of proof rests on the person asserting any given fact to lead sufficient evidence to establish that fact on the balance of probabilities. This means that in this application, the onus is on the Landlords to prove that it is more likely than not that the female Landlord's true intention is to live in the rental unit and not just stay there temporarily until she decides in her own mind what is happening with her marriage.
10. Based on the evidence led by both parties, it seems to me that although the female Landlord is genuinely sincere about moving into the Tenant's unit, her plans for the future are less than firm. I say this for a number of reasons. The evidence of the female Landlord on December 18, 2008 was that she and her husband were trying to "resolve" their problems and that she had not at that point decided where she was going to go and what she was going to do. At both hearings the evidence clearly indicated that although the Landlords were contemplating trying to live separate and apart they had not really put their minds to issues of custody, support or division of matrimonial property and they had not even progressed so far as to tell their respective families they intended to separate. Based on all of the evidence before me I believe that the Landlords genuinely have not decided yet whether their marriage is over or not. As a separation plan the proposal put forward by the female Landlord smacks of a temporary solution until the Landlords decide to either formerly separate, settle issues of custody, property and support, or reconcile.
11. As a result, I am not convinced that the female Landlord intends anything more than brief and temporary occupation of the rental unit and as a result, and pursuant to *MacDonald*, I find that the use proposed by the Landlords does not constitute residential occupation as contemplated in subsection 48(1) of the Act.
12. As a result, the Landlords' application shall be dismissed.

The Tenant's Application (TST-02088)

The Application for a Rebate in Form T1

13. The Tenant's application claims that the Landlord is charging more than the lawful rent.
14. It was the evidence before me that when the tenancy commenced the monthly rent was \$550.00. Shortly after the tenancy began the Landlords switched cable television providers and offered the Tenant an additional service of cable television. The Landlords offered to provide the Tenant with a box which when attached to her television would provide cable channels to her in exchange for an additional amount of \$10.00 per month. The Tenant accepted this offer and started to pay \$560.00 per month for rent. The Tenant was apparently content with this arrangement until she did some investigating and discovered that additional boxes such as the one provided to her only cost \$3.00 on top of the regular fees for cable service. The Landlords filed into evidence a copy of the bill which shows that there are three receivers which are rented to the Landlords for \$3.00 each plus taxes and the actual service is an additional \$54.00 plus taxes. If the costs are divided equally among the three receivers then the actual cost of the additional service is \$23.73 per receiver.
15. At the hearing before me I brought the attention of the parties to section 121 of the Act and invited their submissions on it. I have now had an opportunity to read the provisions more closely and it seems to me that section 123 of the Act applies to this situation rather than section 121 as I indicated in the hearing. The reason I say this is because both sections 121 and 123 refer to the situation where rent is increased by way of agreement between a landlord and tenant when a service is added. However, section 123 would appear to address the situation where the added service is either parking or "a prescribed service", and paragraph 121(1)(b) would appear to be intended to address added services which are not included in section 123. Subsection 16(1) of Ontario Regulation 516/06 says that cable or satellite television is a prescribed service for the purposes of section 123. As a result, I am of the view that section 123 applies to the agreement between the Landlords and Tenant for cable and not section 121 as I stated at the hearing.
16. Section 123 says a landlord may increase the rent charged to a tenant for a rental unit "as prescribed" at any time if the landlord and the tenant agree that the landlord will add the service in question. The phrase "as prescribed" means that the amount by which the rent can be increased for the additional service is set out in the regulation. Subsection 16(2) of the regulation says: "the maximum increase in rent ... shall be the actual cost to the landlord of the service ... that is the subject of the agreement or, where the actual cost to the landlord cannot be established or where there is no cost to the landlord, a reasonable amount based on the value of the service, facility, privilege, accommodation or thing".
17. In her application the Tenant takes the position that the actual cost to the Landlords for the cable is the \$3.00 charged for the extra receiver. This is because as long as the Landlords purchase the cable service for their own use then extending the service to her only involves renting an additional box. I do not agree with this reasoning on the part of the Tenant because subsection 16(2) speaks of "the actual cost to the landlord of the service" and not "the additional cost to the landlord of providing the service". In other words, the actual cost to the Landlords of the service must include the fees they pay for the signal as well as the taxes charged on the service. It is very clear from the bill filed by

the Landlords that the actual cost of providing the service is \$23.73 per receiver. As the increase in rent of \$10.00 is less than the actual cost of providing the service, I find that the \$10.00 increase that the Tenant agreed to pay is not an illegal charge or illegal rent under the Act.

18. As I stated at the hearing, the Landlords and Tenant are free to negotiate a decrease in rent if the Tenant wishes to return the receiver. However, as long as the Tenant wishes to continue to receive cable the Landlords have an obligation to provide it and the cost of \$10.00 is part of the lawful rent.
19. There was no dispute between the parties that on April 11, 2007 the Tenant paid to the Landlords a last month's rent deposit of \$550.00 and the Landlords have never paid interest on that deposit.
20. Subsection 106(6) of the Act says that a landlord shall pay interest on a deposit to a tenant annually. This means that interest became payable to the Tenant on April 11, 2008. Interest is calculated by multiplying the deposit by the annual guideline amount for the year in which the interest became payable. In 2008 the annual guideline amount announced by the government was 1.4%. As a result, the interest payable to the Tenant on April 11, 2008 was \$7.70.
21. However, subsection 106(3) says that if the lawful rent increases after a tenant has paid a rent deposit, the landlord may require the tenant to pay an additional amount to increase the rent deposit up to the new lawful rent. In this situation, the lawful rent increased to \$560.00 when the Tenant and the Landlords agreed to add cable as a service and the Landlords could have required the Tenant to top up her deposit by \$10.00 at that time but they did not.
22. More importantly, subsection 106(7) says a landlord may deduct from the interest payable the amount required to top up the deposit if the deposit is less than the lawful rent. As the total interest payable right now is less than the amount required to top up the deposit to the lawful rent, the Landlords essentially have a choice: they can pay the Tenant the \$7.70 in interest; or they can add it to the deposit to make the deposit total \$557.70. If the Landlords add the interest to the existing deposit, then on April 11, 2009 the interest that will be payable would be calculated using \$557.70 as the amount of the deposit being held.

The Application About Tenant Rights in Form T2

23. It was the evidence of both parties that there was an agreement at the beginning of the tenancy that the Landlords could enter on Wednesdays to do laundry. There was some evidence to suggest that at the beginning of the tenancy this was relatively non-problematic. Instead of giving written notice the female Landlord would call the Tenant to inform her she was coming to do laundry or do it while the Tenant was out. However, according to the Tenant, the female Landlord started entering to do laundry on days other than Wednesday. The Landlords did not really dispute that fact but rather felt it was non-problematic.

24. The Tenant entered into evidence a copy of a letter she wrote to the female Landlord dated April 12, 2008. It concerns a number of issues but says: "The original agreement was ONCE A WEEK (every Wednesday) and now it seems to be several days a week." On August 13, 2008 the female Landlord wrote a letter to the Tenant saying she was going to do her laundry on the following day, August 14, 2008. As August 14 was a Thursday, the Tenant objected and it is clear from the subsequent correspondence that the female Landlord and the Tenant argued over the Landlords' notice of entry. The Tenant wrote the Landlords a letter dated August 14, 2008 in which she said that the Landlords would no longer be permitted access at all to do their laundry because they refused to stick to the agreement with respect to Wednesdays only.
25. The Tenant had no right to try and bar the Landlords from accessing the laundry as it was part of her tenancy agreement. Just as the Landlords have to live with the restriction to Wednesdays imposed by the agreement, so the Tenant must live with the intrusions on a Wednesday provided proper notice is provided. The female Landlord wrote back stating that the Tenant had no right to bar her access to the laundry facilities once a week with notice whether the Tenant liked it or not.
26. Agreements such as this one with respect to accessing the laundry facilities are specifically contemplated by the Act. Section 25 says a landlord can only enter into a rental unit during a tenancy in accordance with sections 26 or 27. Section 26 is about entries that are permitted without notice and section 27 covers the situations where entry with notice is permitted. Paragraph 27(1)5 of the Act says: "a landlord may enter a rental unit in accordance with written notice given to the tenant at least 24 hours before the time of entry ... for any other reasonable reason for entry specified in the tenancy agreement." Paragraph 26(1)(b) says that a landlord can enter without notice if the tenant consents at the time of entry.
27. In other words, if the Landlords want to do laundry they are required to give 24 hours written notice in advance and under section 27, they can only do so in accordance with the lease agreement, which restricts them to Wednesdays. Pursuant to subsection 27(3) the written notice must specify the reason for entry, the day of entry and a time of entry. The time of entry listed must be between the hours of 8 a.m. and 8 p.m. The only other way for the Landlords to gain entry to do their laundry is for them to ask the Tenant for consent, and that consent is only valid if it is given at the time of entry.
28. It is clear from the evidence of both parties that the Landlords entered the rental unit to do laundry in contravention of the Act but there was insufficient evidence before me to determine how many times it happened.
29. It was also the evidence before me that the Landlord entered the rental unit without notice or consent for other reasons. On August 18, 2008 the female Landlord opened the interior door leading up to the Landlords' living quarters and placed in the rental unit some tapes and a notice to terminate.
30. As a result of all of the above, I am satisfied that the Landlords contravened section 25 of the Act more than once.

31. The laundry dispute led to other difficulties that were also the subject of the Tenant's application. One day in early September, 2008 the Tenant returned home to find the female Landlord doing laundry pursuant to a notice of entry she had served previously. At 8 p.m. the Tenant asked the Landlord to leave because she took the position that the Act only permits entry between the hours of 8 a.m. and 8 p.m. The female Landlord wanted to finish her laundry and an argument ensued so the Tenant called the police. According to the Tenant the female Landlord told her: "don't provoke me"; that the Tenant was being evicted; and the Tenant could shove the law up her behind. The Tenant's mother was the Tenant's Witness. She testified that she was on the telephone with the Tenant when this incident occurred and heard the female Landlord say "don't fucking provoke me" and "I don't care how many fucking witnesses you have". The Tenant's Witness told the Tenant to call the police which she did. The female Landlord acknowledged swearing at the Tenant and saying that the Tenant could shove the law up her ass, but denied threatening her or saying anything about witnesses. No charges were laid as a result of this incident.
32. A landlord and tenant relationship is not a friendship. It is a professional relationship where the landlord is running a business and the tenant is a customer of the landlord. In a business relationship it is simply not appropriate to scream and yell or swear at one's customers. If the Tenant was doing something the Tenant had no right to do, then the appropriate response on the part of the Landlords would be to serve notice of termination under the Act, but the Tenant had every right to insist on entry in accordance with the Act.
33. Section 22 of the Act states: "A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed substantially interfere with the reasonable enjoyment of the rental unit or the residential complex in which it is located for all usual purposes by a tenant or members of his or her household." Section 23 says: "A landlord shall not harass, obstruct, coerce, threaten or interfere with a tenant."
34. Harassment is not defined in the Act but I believe it would be accurate to define it as a course of action which a reasonable person knows, or ought to know would be unwelcome. I am of the view that a reasonable landlord ought to know that yelling and swearing at a tenant would be unwelcome conduct. I am also of the view that the female Landlord's intrusion into the rental unit to do laundry after 8 p.m. substantially interfered with the Tenant's reasonable enjoyment or she would not have called the police. As a result, I am satisfied that by swearing and yelling at the Tenant when asked to leave because it was 8 p.m., the female Landlord contravened sections 22 and 23 of the Act.
35. The Landlords also did a number of other things that they should not have done under the Act:
 - The rental agreement entered into between the parties required the Tenant to pay her rent in cash only. That is actually contrary to section 108 of the Act which says a landlord cannot require a tenant to provide post-dated cheques or "other negotiable instruments". Essentially, anything worth money is a negotiable instrument so what section 108 means is that a landlord or a tenancy agreement cannot dictate to a tenant the form of payment of the rent. The tenant is entitled to pay anyway he or she likes.

On August 18, 2008 the Landlords served notice to terminate on the Tenant and that notice was based in part on the Tenant's desire to pay by personal cheque rather than by cash.

- The Landlords freely acknowledged that they asked for more rent when the Tenant's boyfriend stayed overnight. In their minds they rented the rental unit to a single person and if more than one person was going to live there, they were entitled to more rent because the presence of the extra person increased their costs for hydro and other utilities. The Act does not permit a landlord to increase the rent because the presence of additional occupants increases their costs.
 - The notice of termination served on the Tenant August 18, 2008 stated that one particular individual that the Tenant had as a guest was not welcome to continue to come over because he had smoked drugs in the back yard. A landlord cannot dictate to a tenant who he or she has as guests. Rather, a landlord has the right to terminate a tenancy where a tenant permits a guest to commit an illegal act on the property or where the behaviour of a guest substantially interferes with the reasonable enjoyment of the landlord or another tenant.
 - The Landlords also admitted that they told the Tenant she would be charged a late fee of \$18.00 for every day she was late paying the rent. Late fees are prohibited pursuant to section 131 of the Act.
 - The Landlords also did not dispute the allegation that they told the Tenant the rent would increase but failed to give her notice as required by the Act.
 - The Landlords failed to provide rent receipts to the Tenant even though she requested them and was required to pay cash. According to the female Landlord, she simply forgot to give the Tenant receipts. More than a year after the tenancy began the Tenant bought a receipt book, gave it to the Landlords, and they subsequently started providing receipts. Section 109 of the Act requires a landlord to provide receipts to a tenant free of charge when asked.
 - After the Tenant got a cat in the fall of 2008 the Landlords taped a notice to her door saying "No pets allowed & no smoking and no posting letters on door use mailbox!" Section 14 of the Act says that a landlord cannot tell a tenant he or she cannot have pets. Basically, if a tenant gets a pet and the presence of that particular pet causes substantial interference with the landlord's or another tenant's reasonable enjoyment, then the tenancy can be terminated because of the behaviour of that particular animal. According to the Landlords, the reason they objected to the Tenant's cat was because the litter box smelled. The appropriate remedy if a tenant has a litter box which is not kept odour free is to serve notice of termination on the tenant pursuant to section 64 of the Act, requiring the tenant to clean up the problem within seven days or face eviction proceedings.
36. It was the evidence before me that the Landlords bought their home shortly before renting it out to the Tenant and that she is the first tenant they have ever had. They testified that the Tenant became vindictive after the original friendly relationship deteriorated and that

her behaviour became unreasonable. I agree with the Landlords that the Tenant should not have barred them entirely from entering the rental unit in accordance with the tenancy agreement. She also should not have served letters on the Landlords by taping them to the Landlords' front door as that is not an acceptable method of service under the Act or the Board's Rules for service on a landlord by a tenant. I also accept that the Landlords' multiple breaches of the Act were primarily committed out of ignorance. But that does not mean that the breaches did not occur or that the Landlords are not legally responsible for them and the Tenant is entitled to some remedy for the breaches discussed above.

37. Given the disruption and stress caused to the Tenant by the privacy breaches of the Landlords I am of the view that the Tenant is entitled to abatement of the rent. Abatement is a contractual remedy. It reflects the idea that if you pay rent you are entitled to all of the goods and services you bargained for and if you are not getting them, then abatement will be ordered commensurate with the difference in value between what you are paying for and what you are receiving. Neither party made submissions as to the calculation of an appropriate abatement of the rent.
38. With respect to the illegal entries, I do not know how many times it occurred but it was clear from the evidence that the problem escalated between April 2008 and the fall of 2008 when the Landlords stopped entering entirely because of their uncertainty over their rights. It was also clear from the evidence that the dispute over entry caused both parties considerable distress. For the six month period between when the Tenant informed the Landlords she objected to their entering contrary to the Act and when they stopped entering, it seems to me that a reasonable abatement of the rent would be about 15% of the rent paid or \$500.00.
39. With respect to the incident involving the female Landlord's harassment of the Tenant by yelling obscenities and the numerous violations of the Act set out in paragraph 33, I believe the Tenant is entitled to additional abatement of the rent. However, most of the items in paragraph 33 are fairly minor. The incident in early September when the police were called seems to have been a one time only event. Given all of the evidence before me and the quantum of the rent charged, it seems to me that an additional abatement of \$50.00 per issue, or \$400.00, is called for and an order shall issue accordingly.
40. In addition, an order will go requiring the Landlords to comply with the provisions in the Act with respect to entry. The only other remedy requested in the application with respect to this issue is that the Tenant requested that I declare the agreement permitting the Landlords entry to do laundry on Wednesdays to be void. I am not prepared to do this because the Tenant agreed to this term and condition of the lease when she entered into it. She may now regret that agreement but it seems to me that it is the Board's obligation under the Act to enforce tenancy agreements and not to abrogate them.
41. Finally, the Tenant's T2 application alleged that the Landlords withheld or deliberately interfered with a vital service. The Tenant testified that in mid-September, 2008 the Landlords notified her that the gas would be turned off for a few days. The Tenant entered into evidence a letter from the female Landlord which she received on September 18, 2008. It says in part: "There will be a disruption in hot water for the next 48 hours due to an exchange in meters..." The disruption in gas service meant that the Tenant could

not use her stove, draw hot water or do laundry. The Landlords' letter offered to let the Tenant use the Landlords' stove and bathtub to heat water for a bath if she needed it. According to the Tenant, this disruption lasted about seven days. The Tenant filed into evidence a packet of correspondence which included letters between the Landlords and Tenant about the gas shut off. On September 22, 2008 the Tenant wrote complaining that the gas had still not been turned on. The female Landlord wrote back apologizing for the delay and explaining that the gas company failed to make the arranged appointment and another had to be booked.

42. At the end of the Tenant's examination in chief, I pointed out to her representative that he had failed to lead oral evidence concerning all of the allegations set out in the Tenant's application. I gave him two opportunities to lead additional evidence but no oral evidence was led concerning why the Tenant took the position that the interruption in gas service constituted withholding or deliberate interference with a vital service rather than an issue of maintenance and repair. So the only evidence before me as to why the Tenant felt turning the gas off was deliberate is some written notes of the Tenant's filed as an exhibit along with correspondence. The notes stated the Tenant phoned the gas company and used the automatic information system to discover the amount of the balance owed on the account and the information that a payment had been made of \$50.00 on September 16, 2008. It is clear from the notes that the Tenant assumed that the fact that there was a balance owing meant that the gas had been cut off because the Landlords had failed to pay the entire balance of the bill.
43. The Tenant also led some evidence that the furnace was not turned on by September 1, 2008 but failed to lead any evidence of temperature readings which would establish the temperature inside the rental unit. Pursuant to section 4 of Ontario Regulation 516/06 heat is a vital service between September 1 and June 15 and the heating system must be capable of warming the rental unit to a minimum of 20 degrees Celsius during that period. As the Tenant led no evidence as to the temperature in the rental unit during those days in September 2008 up until the furnace was turned on, I find that she led insufficient evidence to establish that the Landlords failed to provide heat as required by the Act.
44. Subsection 21(1) of the Act says: "A landlord shall not at any time during a tenant's occupancy of a rental unit and before the day on which an order evicting the tenant is executed, withhold the reasonable supply of any vital service... that it is the landlord's obligation to supply under the tenancy agreement or deliberately interfere with the reasonable supply of any vital service..."
45. I am of the view that subsection 21(1) is intended to address the situation where a landlord deliberately decides to cut off or interfere with a vital service. I say this because the word "withhold" is an active verbal implying the landlord must actively choose to not supply the service. In addition, the phrase "deliberately interfere with" clearly indicates intent by a landlord to deliberately deny the vital service is a core part of what subsection 21(1) is designed to address.
46. The Tenant's application with respect to the gas shut off is based on subsection 21(2) of the Act which says in part: "a landlord shall be deemed to have withheld the reasonable supply of a vital service... if the landlord is obligated to pay another person for the vital

service, ... the landlord fails to pay the required amount and, **as a result of the non-payment**, the other person withholds the reasonable supply of the vital service.”
[Emphasis added.]

47. As can be seen from the wording of this subsection, if the Tenant wants to rely on it she must establish that the cause of the shut off was as a result of non-payment to the gas company. However, it was the Tenant’s own evidence that the Landlords had made a payment on September 16, 2008. The Tenant merely suspected non-payment was an issue because payment was not made in full. In my experience it is not unusual for a utility company to permit customers to carry a balance without threatening a shut off as long as the customer is making regular minimal payments. As a result, it does not automatically follow that a balance owing means the shut off of the gas was due to non-payment, as the Landlords were clearly making payment on the account. This means that the evidence before me is that it is possible that the gas was shut off for non-payment; but it is equally possible it had to shut off for required maintenance as set out in the Landlords’ letters. Given the fact that the Landlords also had to go without gas during the relevant period it seems highly unlikely to me that the Landlords deliberately decided to shut the gas off for anything other than maintenance purposes. As a result, this aspect of the Tenant’s application shall be dismissed.

The Tenant’s Application for a Rent Reduction in Form T3

48. The Tenant’s application alleged that garbage and recycling removal service was discontinued in July of 2008. Neither party led much evidence with respect to the garbage and recycling, but I believe the evidence indicates that the Tenant places her garbage and recyclables in bins beside the building, and her complaint is that the Landlords used to put it out on the street for pick up but stopped doing so. On cross-examination the Tenant conceded she remembered being told by the male Landlord that shovelling the snow was not her responsibility but she was not told that putting her garbage on the curb was also not her responsibility.
49. The male Landlord testified that he used to put the Tenant’s garbage to the curb regularly but he “got tired of doing the Tenant’s job” as it was her responsibility to deal with her own garbage and he never told her otherwise. The female Landlord indicated it was never part of the tenancy agreement that the Landlords would take the Tenant’s garbage to the curb.
50. This part of the Tenant’s application was brought pursuant to section 131 of the Act which says in part: “A tenant of a rental unit may apply to the Board for an order for a reduction of the rent charged for the rental unit due to a reduction or discontinuance in services or facilities provided in respect of the rental unit or the residential complex.”
51. I believe that in order for section 131 to apply to any given situation, a tenant must first establish that the tenancy agreement included a term requiring the landlord to provide the service in question. The problem that I have with this aspect of the Tenant’s application is it is not clear to me that there was ever any explicit agreement that the tenancy included a term which required the Landlords to take out the Tenant’s garbage. Rather the evidence would suggest otherwise as the Landlords’ clearly believed it was the Tenant’s

responsibility to deal with her own garbage; and the Tenant assumed that the male Landlord's actions in doing it near the beginning of the tenancy meant that it was an included service. As a result, I am not satisfied that it was part of the tenancy agreement that the Landlords would take the Tenant's garbage to the curb. Because I am not satisfied that was ever part of the agreement between the parties, I cannot find that the service has been discontinued as I am not convinced it was ever included. Therefore, the Tenant's application for a rent reduction shall be dismissed.

The Tenant's Maintenance and Repair Application in Form T6

52. The Tenant's application lists three separate disrepair issues: the damaged window blind; the refrigerator; and flooding which occurred twice.
53. It was both the Landlords' and Tenant's evidence that there is a window beside the door to the rental unit which had a blind hanging in it when the Tenant moved in that was supplied by the Landlords. The Tenant testified that in June or July of 2007 the blind fell on the Tenant's head without her having pulled on it with force. She told the Landlords about it. According to the male Landlord the blind was hung from the drywall ceiling and was secured with three plugs and when he examined it he found the track broken. Because the track was broken it could not be fixed but rather needed to be replaced. Essentially the Landlords took the position that the blind would not have fallen unless the Tenant had pulled too hard on it and therefore, the Tenant was responsible for fixing it. They made suggestions to her where inexpensive replacement blinds could be bought but instead of buying a replacement blind the Tenant tacked a sheet up over the window.
54. Subsection 20(1) of the Act states: "A landlord is responsible for providing and maintaining a residential complex, including the rental units in it, in a good state of repair and fit for habitation and for complying with health, safety, housing and maintenance standards." Section 34 says: "The tenant is responsible for the repair of undue damage to the rental unit or residential complex caused by the wilful or negligent conduct of the tenant, another occupant of the rental unit or a person permitted in the residential complex by the tenant." If a landlord takes the position that a tenant is responsible for disrepair then the landlord can also serve notice of termination on a tenant pursuant to section 62 of the Act.
55. The problem here is that the Landlords have assumed that the blind was broken by the Tenant without any evidence that was so, except for the fact that it fell down and they believe it would not have fallen with normal use. They were not present when the blind fell and they are not experts in blind installation. Essentially landlords are responsible for repairing everything in a rental unit unless they can establish that the disrepair was caused by wilful or negligent conduct on the part of a tenant. Belief is not evidence and suspicion is not enough. It is not unheard of for plugs in a dry wall ceiling to come loose over time so without some other evidence I am not convinced the Tenant wilfully or negligently damaged the blind. As a result, the Landlords are responsible for repairing it and an order will go according.
56. The Tenant's application requested compensation of \$33.90 for the cost of the sheet the Tenant hung over the door, but no evidence was led with respect to the value of the sheet

so the request for compensation shall be denied. At the hearing before me the Tenant also requested abatement of the rent. Given the minor nature of the disrepair to the blind, the fact that the Tenant was so undisturbed by the problem that she did nothing more than hang a sheet up, and the amount of rent charged, I am of the view that only a minimal abatement of the rent is warranted and fix the abatement amount at \$50.00 for the period commencing July 2007. If the Landlords do not replace the blind in a timely manner then the Tenant will be entitled to additional money off the rent until the blind is replaced.

57. It was the evidence before me that fairly early in the tenancy the Tenant complained about the refrigerator icing up and ruining her perishable foods. The male Landlord testified that there is only one thermostat for the refrigerator and it needs frequent defrosting. On cross-examination he was showed photographs of the refrigerator that the Tenant had entered into evidence and conceded that it was possible the door did not properly seal although it did when he checked it. In response to my questions he stated that the refrigerator came with the house and he never had a contractor in to look at it. Contrary to the Landlords' evidence, the photographs show two separate thermostats inside the refrigerator – one for the freezer and one for the refrigerator. Extensive ice can be seen inside the refrigerator section which has clearly formed from water dripping from the top whereas the only ice build up in the freezer section is around the door seal.
58. Clearly a refrigerator in a good state of repair should not have dripping water and ice build up in the refrigerator compartment. On older refrigerators which are not self-defrosting ice can building up in the freezer compartment. It is my experience that sometimes if the freezer compartment is not defrosted ice can gradually expand into the refrigerator compartment below, but that is not what is depicted in the Tenant's photographs. I am of the view that the only rational explanation for the state of the refrigerator as depicted in the photographs is that it is malfunctioning and is in need of repair. As a result, I find that by failing to repair the refrigerator the Landlords have not maintained the rental unit in a good state of repair as required by section 20 of the Act. An order will issue requiring the Landlords to repair or replace the refrigerator.
59. The photographs show that although it is malfunctioning the Tenant has some use of the refrigerator and it was the evidence before me that prior to moving in the Tenant did not cook and normally eats take out or other forms of convenience foods. As a result, although the disrepair to the refrigerator was unfortunate, I find that it did not have the same impact on the Tenant that it would have had on a tenant who regularly cooked their own meals from produce kept in the refrigerator. Nonetheless the Tenant is entitled to some abatement of the rent. Given the amount of the rent charged, the impact on the Tenant of the disrepair, and the length of time the refrigerator has been in a state of disrepair, I am of the view that a reasonable abatement of the rent would be about 2% of the rent charged or \$150.00. Again, if the Landlords fail to repair the refrigerator in a timely manner then the Tenant will be entitled to further abatement of the rent.
60. The Tenant's application also requested that an order issue prohibiting the Landlords from taking any rent increase until the disrepair had been rectified although no oral submissions were made respecting the remedy. Section 30 of the Act indicates that such an order is possible where the Landlord has committed a "serious breach" of the Act. I am

of the view that the phrase "serious breach" is intended to refer to significant disrepair and substantial failure to do repair on the part of a landlord. Here, although the Landlords failed to do repairs, the minor nature of the disrepair issues with respect to the blind and the refrigerator are not items of significant disrepair and I am of the view that an order prohibiting rent increases is simply not justified.

61. The Tenant testified that in the summer of 2008 the rental unit was flooded twice. There was heavy rainfall and the driveway filled with water. The driveway has a drain in it which should have diverted the water but instead it seems to have travelled through the garage and into the Tenant's rental unit. According to the Landlords when the first flood happened they cleaned out the drain and the catch basins in the driveway and under the garage. They removed a considerable amount of material from it and unblocked the drain and believed the problem was resolved. They also installed a screen or mesh in the drain to decrease the amount of material that could block it in the future. On July 8, 2008 the drain overflowed again and the Tenant's rental unit was substantially flooded. The female Landlord helped the Tenant clean up the rental unit and the Landlords have replaced some of the Tenant's possessions that were damaged in the flood. The Landlords also changed the screen mesh they had installed in the drain to ensure that a leaf could not get stuck in the drain and block it. No further problems have been observed by either party with respect to the drain.
62. Clearly by fixing the drain after each occurrence of flooding the Landlords did some repair and maintenance work. Essentially the Tenant takes the position that she does not believe that it is in fact repaired, and she wants compensation for the damage to her possessions and the disruption caused by the clean up of her rental unit after the flooding. Given that there has been no reoccurrence of the problem of flooding since July 2008 I am not convinced that the Landlords failed to repair the drain.
63. I am of the view that prior to the first flood in May or June of 2008 any problem with the drain was a latent defect. A latent defect is a disrepair or maintenance problem that a landlord cannot reasonably be expected to be aware of until something goes wrong. So if a pipe bursts in a wall and the landlord had no way of knowing before hand that something was wrong with the pipes, then that is a latent defect. Case law in this area essentially establishes that a landlord cannot be held financially liable for damage caused by a latent defect. This is why many landlords recommend to tenants that they purchase tenant's contents insurance so if a latent defect manifests, a tenant will have insurance to reimburse him or her for their damages.
64. Clearly, before the first incident of flooding in May or June of 2008 the evidence supports the proposition that the Landlords had no knowledge of any problem with the drain in the driveway. They had only purchased the residential complex the year before the tenancy commenced and had experienced no difficulties with the drain at all. After the first flood occurred the Landlords repaired the problem and as far as they were concerned it was fixed. The male Landlord is a general contractor with some knowledge of how the drain should properly work and it was his evidence that the repairs undertaken after the first flood should have been sufficient to repair the drain. The Tenant led no evidence whatsoever to indicate that the Landlords failed to properly repair the drain after the first flood. Given the steps taken to repair the drain the first time flooding occurred, it seems to

me not unreasonable for all of the parties to assume the problem was solved. The only evidence that the Landlords failed to repair the drain properly the first time was the fact that a second flood happened. The only evidence with respect to the cause of the second flood was the male Landlord's speculation that it might have been caused by a leaf being caught in the mesh which is why he replaced the mesh with a larger gauge. If there was any evidence that the first repair had been performed in an inadequate or negligent manner then the second flood would have been foreseeable and not the result of a latent defect, but there was no evidence before me to support that conclusion. Therefore, I am of the view that the second flood was also caused by a latent defect, and the Landlords cannot be held financially liable to the Tenant for the damages to her possessions caused by the flooding.

65. Once a latent defect manifests itself, a landlord can be held financially liable for the period after the flood occurs or the pipe bursts. That is because the disrepair has become known to the landlord who is expected to repair it. Here, it was the evidence before me that after the flooding occurred the Landlords went out of their way to clean up the rental unit immediately after the damage occurred and replaced many but not all of the Tenant's possessions. Given their speedy response to the disrepair to the rental unit caused by the flood, and the fact that they replaced some of the Tenant's possessions when they had no legal obligation to do so, I am of the view that no further abatement of the rent is warranted.
66. Some evidence was led by the Tenant that the Landlords failed to maintain the exterior of the residential complex by failing to clean up garden waste and clear away children's toys but the only mention of it in the Tenant's application is in the remedies section and not in the section which asked the Tenant to identify the problem. The Tenant's evidence in this regard was extremely brief but she did file into evidence a copy of a letter sent to the Landlords dated September 28, 2008 complaining about garden waste not being cleared away from the patio entrance to the rental unit. The letter also states that golden rod in the garden was causing the Tenant to have allergic reactions but no oral evidence or medical evidence was led that the state of the garden had any health effects on the Tenant at all. As the Landlords led no evidence with respect to the maintenance of the yard, the only evidence before me is that it was not properly maintained. As a result, I find that the Landlords have failed to maintain the grounds of the residential complex and an order will issue requiring them to regularly maintain the grounds of the residential complex. Given the minor nature of this issue and the lack of any other evidence as to the effect of it on the Tenant, I am of the view that no further abatement of the rent is warranted.

It is ordered that:

1. The Landlord's application is dismissed.
2. On or before February 28, 2009 the Landlords shall either pay to the Tenant \$7.70 as interest on her deposit, or they shall inform her in writing that the interest has been added to the deposit being held.
3. The Landlords shall pay to the Tenant \$1,100.00 as an abatement of the rent.

4. The Landlords shall also pay to the Tenant \$45.00 for her cost of filing the application.
5. If the Landlords do not pay the Tenant the full amount owing by February 28, 2009 the Landlords will owe interest. This will be simple interest calculated from March 1, 2009 at 4.00% annually on the outstanding balance.
6. If the Landlords do not pay the Tenant the full amount owing by February 28, 2009, the Tenant may recover this amount by deducting \$500.00 from the rent each month from March 1, 2009 to April 30, 2009 and \$145.00 from the rent due on May 1, 2009.
7. The Tenant has the right, at any time, to collect the full amount owing or any balance outstanding under this order.
8. The Landlords shall only enter the rental unit pursuant to the provisions of the Act.
9. On or before March 15, 2009 the Landlords shall:
 - Replace the window blind in the rental unit; and
 - Either hire a professional to repair the refrigerator in the rental unit, or replace it with one which is in a good state of repair.
10. The Landlords shall maintain the exterior grounds of the residential complex in a neat and tidy manner.
11. If the Landlords do not complete the repairs under paragraph 9 of this order on or before March 15, 2009, then the Tenant is authorized to deduct an additional \$50.00 from her rent for each month until the repairs are completed.

February 17, 2009
Date Issued

Ruth Carey
Member, Landlord and Tenant Board

Toronto South Region
2nd Floor, 79 St. Clair Ave. E
Toronto ON M4T 1M6

If you have any questions about this order, call 416-645-8080 or toll free at 1-888-332-3234.